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Attorney for Plaintiff
Nancy Miracle, aka
Nancy Maniscalco Green

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII


NANCY MIRACLE,)	CIVIL NO. 92 00605 ACK
aka, NANCY MANISCALCO GREEN,)	(Non Motor Vehicle Tort)
)	
Plaintiff,)	DEMAND FOR JURY TRIAL
)	
vs.)	
)	
ANNA STRASBERG, as Administratrix,)	
c.t.a. of the Last Will and)	
Testament of MARILYN MONROE.)	
)	
Defendant.)	
)	
)	

DEMAND FOR JURY TRIAL

TO: ANNA STRASBERG, as Administratrix,
c.t.a. of the Last Will and Testament
of MARILYN MONROE
600 Third Avenue
New York, New York 10016

Please Take Notice that plaintiff demands trial by jury in
this action.

Dated: Honolulu, Hawaii,

11/27/92

JohnAaron Murphy Jones
Attorney for Plaintiff

United States District Court

FOR THE DISTRICT OF HAWAII

NANCY GREENE, aka NANCY
MANISCALCO GREEN

Plaintiff,
v.

ANNA STRASBERG, as Administratrix
c.t.a. of the Last Will and
Testament of MARILYN MONROE
Defendant.

SUMMONS IN A CIVIL ACTION

CASE NUMBER: Civil No. **92-00605**
(Non-Motor Vehicle Tort)

DEMAND FOR JURY TRIAL

TO: (Name and Address of Defendant)

ANNA STRASBERG, as Administratrix
c.t.a. of the Last Will and
Testament of MARILYN MONROE
C/O Irving P. Seidman

Attorneys for the Estate of Marilyn Monroe
600 Third Avenue
New York, New York 10016

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

John Aaron Murphy Jones
Attorney at Law
1170 North King Street
Honolulu, Hawaii 96717
808 926-9078

an answer to the complaint which is herewith served upon you, within 20 days after service of
this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken
against you for the relief demanded in the complaint.

WALTER A. Y. H. CHINN



CLERK

/s/ Toni Fujinaga

BY DEPUTY CLERK

NOV 27 1992

DATE

EXH B

At Chambers of Surrogate's Court
held in and for the County of New
York, at the Surrogate's Court,
31 Chambers Street, New York,
New York, on the 6th day of
May, 1990.

SURROGATE'S COURT
NEW YORK COUNTY
JUN - 8 PM 2:30
CERTIFICATES
FILED

PRESENT:

HON. MARIE M. LAMBERT

Surrogate.

-----x
Proceeding by Anna Strasberg, as
Administratrix, c.t.a. of the Last
Will and Testament of

File No. P2781/62

MARILYN MONROE,

Deceased,

**ORDER APPROVING
MERCHANDISING
AGREEMENT**

for an Order for Advice and Direction
as to the Propriety, Price, Manner
and Time of Entering into a
Merchandising Licensing Agreement
Using the Name, Trademarked Signature,
and Likeness of Marilyn Monroe,
Deceased,

Petitioner

THE FRANKLIN MINT.
-----x

On reading and filing the petition of Anna Strasberg as Administratrix, c.t.a.
of the Last Will and Testament of Marilyn Monroe wherein she seeks advice and direction
concerning a licensing agreement with The Franklin Mint dated November 2, 1989 and
upon all papers and proceedings herein; and the said merchandising licensing agreement
having been approved on the record on May 15, 1990 it is

EXHIBIT "C"

29 Columbia Law Review 748

PRETERMITTED HEIRS: AN ANALYSIS OF STATUTES¹

After the death of a testator it is discovered that his child is unmarried and there is no intestate property. Confronted with this disinheritance, the common law is powerless to act. If the child was born prior to the will he has been subjected to the unquestioned power to disinherit; if born later, to the same power on the theory that birth of issue alone is not such an event as to raise a presumption of intent to revoke, nor does it constitute a "tacit condition" and revoke regardless of intent.²

An effort of a single legislature to attach an effect to a specific group of facts is not necessarily evidence of a real need, but a series of such efforts from coast to coast is a clear indication of a far-flung attitude. Undoubtedly, as in England, Americans might have rested content with the judicial recognition of the unqualified power to disinherit; but actually, we have not.

Given this condition of the common law, an attitude of disapproval might plausibly be based on one of two grounds; (1) such disinheritation violates a social duty to provide for the family, in particular, for issue, or (2) it violates the presumption that a parent will wish to

¹ At Roman Law the term "preterition" was more prevalent than "pretermis- sion." Either meant the omission by a testator to mention an heir in his will. HEUMANN-SECKEL, *HANDELIKON ZU DEN QUELLEN DES ROMISCHEN RECHT*. "An heir not formally appointed or disinherited was called *preteritus* (passed over or omitted). Die. 28, 2, 3, secs. 2-4. And the praetor or proper magistrate on petition would give him a share in the inheritance." 2 SHERMAN, *ROMAN LAW IN THE MODERN WORLD* (2d ed. 1922), 263. Also see Lefroy, *Flaws in the Common Law* (1918) 54 Can. L. J. 131. The term is more properly used of heirs living at the time of the execution of the will, but has in recent times been extended to include after-born heirs as well. In a modern case, speaking of an after-born child, the court says, "To pretermis is to pass by, to omit, to disregard. If the intention to exclude appears upon the face of the will, the child has not been omitted, or passed by." Allison v. Allison, 101 Va. 537, 569, 44 S. E. 904, 915 (1903); Porter v. Porter's Exec., 120 Ky. 302, 306, 86 S. W. 546, 547 (1905).

² The common law rule that birth of issue alone did not revoke a parent's prior will is too well-established to require citations. See *Doe v. White v. Barford*, 4 M. & S. 10, 105 Eng. Rep. 739 (1815); *Easterlin v. Easterlin*, 62 Fla. 468, 56 So. 688, Ann. Cas. 1913 D, 1316 with note at 1318 (1911). *Contra*: *McCullum v. McKenzie*, 26 Iowa 510 (1868); *Negus v. Negus*, 46 Iowa 487 (1877). By the *Wills Act*, 7 Will. IV, c. 26, § 19 (1837) it is provided "No will shall be revoked by any presumption growing out of an alteration of circumstances." See the same provision in *New Brunswick Rev. Stat.* (1927) c. 173, § 43; *Barr. Col. Rev. Stat.* (1911) c. 241, § 16; *Ontario Rev. Stat.* (1927) c. 149, § 21.

On May 16, 1928, Viscount Astor proposed in the House of Lords that a "select committee be appointed to see whether a change is necessary in the laws governing testamentary provision for wives, husbands and children." After discussion, the motion was withdrawn. *PARLIAMENTARY DEBATES*, House of Lords, vol. 71 (1928) cols. 38-61. See also (1928) 44 L. Q. Rev. 281.

PRETERMITTED HEIRS

uniform to such a duty. The first looks to the preservation and support of those for whose existence in this world the testator is responsible. It insists on his protecting them regardless of his expressed desire. The second looks to the preservation of the individual's power to dispose of his property as he wishes. Although this power is initially limited by a charitable presumption that it will be exercised to protect the testator, in the last analysis the power is preserved supreme even though it exercises violate social obligations.

The discussion that is to follow will indicate that the Civil Law has accepted the first basis of objection to the power to disinherit. Similarly, modern legislation in several of the Dominions shows the same foundation. On the other hand, legislation throughout the United States have almost unanimously adopted the second—they are seeking to protect the disinherited child only in so far as they deem it consistent with the presumed intent of the testator.

This paper will not attempt to discuss the relative merits of these two attitudes. Rather it will attempt to approach the matter in this spirit: given the American attitude, with what measure of success do our statutes effectuate it? This is not an assumption that presumed intent is a sound attitude. It is merely the acceptance of such an attitude as a standard to measure our legislation. Furthermore, the problem will be regarded as one in analysis and comparison of statutes rather than in interpretation.

TYPICAL MAJORITY PROVISIONS

Among all American jurisdictions there are but seven without treatments dealing with the power to disinherit issue by will. Of these, only three are states.³ It may thus be accurately stated that the old common law power of disinheritance has been substantially modified.

Those provisions most generally prevalent may be rapidly described. Their typical fact basis is the combination referred to: child will followed by the birth of issue unprovided for in the will. Presence of these facts produces, by these statutes, a typical effect—though variously expressed, this amounts in reality to partial intestacy. The after-born child takes by inheritance the portion of his parent's estate both real and personal, that he would have taken had his parent testate. Further, this effect is accompanied by certain devices for avoidance of it. Obviously, since it contradicts the fact hypothesis, inclusion in the will prevents this partial intestacy. Another, though prevalent, device is provision by *inter vivos* settlement. Again,

Florida, Maryland and Wyoming. In addition, no provisions are found in the District of Columbia, Territory of Hawaii and the Philippine Islands.

EXH D

expression in the will of an intent to disinherit is a generally recognized method. Occasionally this intent must be expressly set forth, but more often it may be implied from "naming" or "mentioning" the future issue in the will, and in a large group the implication is allowed for, but its basis not stated. In short, it may be said that the typical statute permits avoidance of the effect of the birth of the later child by provision for him, by anticipation, in or out of the will, or by an expression or implication of intent not so to provide. Continuing, our typical statute concludes with a provision that the share of the pretermitted child be made up by contributions *pro rata* from the beneficiaries under the will.

Before noting the variations on our typical statute it might be well to note again the policy behind it. Fundamentally, it is a desire to prevent inadvertent disinheritance.⁴ Presumably a parent, so it goes, desires to provide for his issue. The likelihood that issue subsequent to the will was unforeseen, otherwise it would have been provided for, leads a solicitous legislature to do what it believes would have been desired had the true circumstances been known. It is a statutory revival of the old common law theory of so-called revocation by circumstances on the basis of presumed intent, applied to a situation not within the common law rule. On the contrary, that it is not an embodiment of that later theory of "tacit condition" independent of intent, is evident from the prominence and effectiveness given an intent to disinherit under these statutes.⁵

⁴Or as it is put in *McLean v. McLean*, 207 N. Y. 365, 371, 101 N. E. 178, 179 (1913), "to guard and provide against such testamentary thoughtlessness and lack of vision as prevent a testator from contemplating the possibility of after-born children and taking such possibility into account in framing a scheme for the testamentary disposition of his property." Also, *Shackelford v. Washburn*, 180 Ala. 168, 171, 60 So. 318, 319 (1912); *Strong v. Strong*, 106 Conn. 76, 80, 137 A.L. 17, 18 (1927); *Gay v. Gay*, 84 Ala. 38, 4 So. 42 (1888); *Wilson v. Fosket*, 47 Mass. 400, 403 (1843); *Ingraham, Appellant*, 118 Me. 67, 69, 105 A.L. 812, 813 (1919).
⁵Revocation by a subsequent marriage and birth of issue as a "tacit condition" at common law; *Marston v. Roe*, 8 A. & E. 14, 112 Eng. Rep. 742 (1839).

The origin of the device for avoiding inadvertent disinheritance found in these modern statutes is often attributed to the Roman Law. Certainly it was found there (see *supra* note 1) and is still found in modern Civil Law: *GERMAN CIVIL CODE*, art. 2303; *FRENCH CIVIL CODE*, art. 913; *LOUISIANA CODE*, 1493 to 1495, and 1705. It represents, however, a solicitude for the issue rather than for the freedom of the power to devise. The earliest American statute is 12 Wm. III (1700), Acts and Laws of Province of Massachusetts Bay, p. 125, but no records contemporary with its enactment have been found to throw light on its origin. It may have developed *vis generis* from the same sense of parental obligation as inspired the Roman Law, it may have been taken directly, or it may have been brought over from the then and present Scottish Law.

An interesting historical study of the Scottish law of inheritance has led its author to believe that the present *legitim*, or indefeasible share, of issue in that jurisdiction owes its origin to the early Aryan conception of community property, first of the tribe, then village, and finally family; that this was recognized in Normandy and brought across to England at the Conquest; that thence it was

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Further, the legislature is not motivated by a desire to provide a temporary support for the period of administration; this is accomplished by statutory allowances. Nor is it trying to supply support and education during minority; the pretermitted child may well be an adult of mature years and established position. Nor does it desire to relieve the state of the expense of supporting paupers that would require the omission of intent to disinherit as an avoidance of pretermittance.

The extent to which these statutes actually affect the population at large would constitute an interesting study. To begin with, probably less than a quarter of the estates of persons dying in this country are ever offered for probate. No doubt only a small portion of this fraction is testate. Since these statutes only operate upon testate estates, they must affect only a small percentage of the total number of persons dying. Consequently only a small minority of persons ever comes within these statutes. But, on the contrary, the property interests will vary inversely.

An estimated distribution of estates of men dying in Massachusetts within the three years 1889-91 inclusive shows a total value of estates of over 202 million dollars, or an average of over 66 millions a year.⁶

Another estimate, this by the Federal Trade Commission, of estates probated in certain selected counties,—rural, town, and city from widely distributed states,—shows a yearly average of about 56 million dollars.⁷ Since larger estates are generally testate, it may be concluded that the property interests that may be affected by the pretermitted heir statutes are very large.

This general comment should also be made. The pretermitted child, if he takes at all, takes his intestate share. In every case where a will gives property to persons not heirs, the total estate received by children not pretermitted but named in the will will be less than their intestate share.⁸ At least this is true in states vesting no discretion in the court as to the allocation of the duty to contribute to make up the share of the omitted child. As a consequence, the child who was expressly provided for is very likely to take less than the child not pro-

taken by King David I to Scotland; that it was abolished in England, but persisted in Scotland, though now erroneously attributed to Roman origin. He concludes that it is the result of a period when testation was unknown and was not, therefore, "created as a restriction on a complete power of testing." Gardner, *Origin and Nature of Legal Rights of Spouse and Children in the Scottish Law of Succession*, (1927) 39 *Jurim. Rev.* 209, 313 and (1928) 40 *ibid.* 72.

⁶Estimated from data of the Mass. Bureau of Labor by WILLIAM I. KING, *WEALTH AND INCOME OF THE PEOPLE OF THE UNITED STATES* 69, 71.

⁷National Wealth and Income, SEN. DOC. NO. 126, 69th Cong. 1st Sess., at 58. Both sets of statistics are taken from SMITH, *TRUST COMPANIES IN THE UNITED STATES* (1928).

⁸The total of the testamentary gifts to children will always be less than the total of their intestate shares where any gift at all is made to a stranger. Of course the individual portions may vary within this total.

MINORITY VARIATIONS

turning from this typical statute we find a group of minority variations diverging from each of its major portions. First there are variations as to the child whose preemption is concerned. Typically he is after-born, but in twenty American jurisdictions a child born prior to the will, or issue of such child,⁸ if the child be deceased, is within the

legislative protection. We have here an extension of solicitude, including grandchildren of prior children. But most interesting is the attitude toward the testator's intent. It would seem reasonable to suggest that the omission of an existing child or grandchild is more likely to be intentional than otherwise. This is recognized in part by

of the jurisdictions, however. In their statutes the will is affected only "if it appears that such omission was not intentional, but was made by accident or mistake."¹⁰ This accords with fact. It places the burden on the child to prove the accidental nature of his omission, which, if proved, justifies the inference of intent to provide. The test here

that such omission was intentional," or a similar clause." Although

(1925) VOL. I, § 23811.
 (1925) VOL. I, § 1207. VT. GEN. LAWS (1917) § 3427; WIS. STAT.
 "This clause appears in the statutes of eight states. CALIF. CIV. CODE (1923)
 § 1307; IDAHO COMP. STAT. (1919) § 7827; MONT. REV. CODE (1921) § 7009; NEW
 REV. LAWS (1912) § 6216; N. D. COMP. LAWS ANN. (1913) VOL. I § 5675; ORE.
 COMP. STAT. ANN. (1921) VOL. II, § 11,255; S. D. REV. CODE (1919) VOL. I, § 636;
 UTAH COMP. LAWS (1917) § 6341.
 Three other states add verbiage at or substance "and"

Two more make no express reference to intent but establish partial intestacy where the "testator omits to mention the name of a (prior) child," Ark. Stat. (1919) § 10,507; or the child "is not named or referred to," N. H. Pub. Laws (1926) ch. 297, § 10.

[illegible]

2. The Fact of Prior Children Living in and Leaving at the Execution of the Will in Relation to the Pretermission of After-born Children

mands comment. It is found in only ten states. The terms are so peculiar as to entitle it to detailed consideration. It will be made under one of two sets of circumstances, either the testator had a child living at the time, or he did not. But does this quite obvious difference in legislative policy justify a difference in the states

answer "yes."¹² Where, for instance, the testator had a child living at the time he made his will, the subsequent birth of another child, in the absence of conditions named in the statute, produces a certain effect. Where, on the contrary, there was no such child living at the time, the birth of another child in the absence of a different set of conditions

This factual distinction in the testator's familial environment seems to have first appeared in a Virginia provision enacted in 1785.¹⁸ This

through all subsequent revisions. In view of the extensive colonization migrating from Virginia into Kentucky, Ohio, and West Virginia, it is not at all surprising to find it in those states. It appeared in Kentucky,¹⁵ for instance, in 1797, in Ohio¹⁶ in 1808, and in West Virginia¹⁷

This, and the preceding note, cover eighteen jurisdictions. The two remaining, Louisiana and Porto Rico, have Civil Law enactments recognizing the legal portion, of "forced heirs," of which no parent can deprive them in the absence of certain statutory "just causes." Intent plays no part at all. La. Rev. Civ. Code (1925) arts. 1493 and 1495; Porto Rico Rev. Stat. Codes (Comp. 1913) §§ 3874, 3876, 3898, 3899.

"ARIZ. REV. STAT. (1919) § 812-121; DEL. REV. CODE (1915) c. 22, § 240, 243; KAN. STAT. (Carroll, 1922) c. 22, § 240, 243; MISS. ANN. CODE (Hemingway Miss., 1927), §§ 3567, 3568; N. J. Code Ann. (1910) ORIO GEN. CODE (1910) § 20, 21; OHIO GEN. CODE (1910) arts. 2891-2893; W. VA. Code Ann. (1923) § 5242-5243; TEX. REV. CIV. STAT. (1925) § 5242-5243; W. VA. Code Ann. (Barnes 1923) c. 22, § 16-17, 17; HEN. STAT. VA. c. 61, § 3, 140, from Rev. Bills 1779, c. 21, passed 1785. This distinction did not appear in the earlier Virginia Act.

2 title 180, § 3, at 1539
1 Little, L. K., 611 and Ky. Dic. of Laws (1834) Moorehead & Brown, vol. 1
5 Hen. Stat. Va. 447 (1748) effective 1751
1 Little, L. K., 611 and Ky. Dic. of Laws (1834) Moorehead & Brown, vol. 1

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in 1868. In addition, it appeared in Mississippi¹⁹ in 1807, in New Jersey²⁰ in 1824, in the Republic of Texas²¹ in 1840, in Delaware²² in 1852, in Kansas²³ in 1865, and lastly in Arizona²⁴ in 1887. This distinction does not appear in the statutes of any other state or territory.²⁵ Each of these statutes, like those in the majority group, may be conveniently divided into three portions. The first is the factual state-ment as indicated above. This is, of course, alternative (a) a child living and (b) a child not living at the time of the will. This appears in this form in all the statutes but that of Delaware. The second, or operative portion, has two distinct aspects: (a) the effect produced by the birth of a child subsequent to the will in each of the alternative situations named, and (b) the devices provided for avoiding this effect. The third, or remedial portion, provides the procedural machinery for the after-born child's procuring the share due him under the operative portion.

Turning to the operative portions, we find that it is customary for the legislatures to deal first with the situation where there was no child living at the time of making the will. Call this case 1. Under such circumstances the birth of any child subsequent to the will operates in five states to suspend the operation of the will until the happening of certain contingencies, while the child, together with all other heirs, takes as by intestacy an estate subject to a special limitation. In Arizona,²⁶ Mississippi,²⁷ and Texas,²⁸ the entire will is suspended, while in Kentucky²⁹ and West Virginia³⁰ there is an added clause, "except so far as it provides for the payment of the debts of the testator." All five states provide that the suspension shall continue at least during the life of the child in question and shall be permanent, unless the child dies unmarried. Arizona and Texas add "under twenty-one," Kentucky and Mississippi add "under twenty-one and without issue" (the

¹⁹ Miss. Terr. Stats. 1807, 275.

²⁰ N. J. Pub. Acts 1824, 174.

²¹ Tex. Laws Rev. 1840, 168.

²² Del. Code (1852) §§ 1653, 1654.

²³ Kan. Laws 1865, c. 86, §§ 38, 41.

This distinction is not present in earlier laws as to pretermitted children. Terr. Kan. Laws 1855, c. 164, § 10, at 636; Laws 1859, c. 131, § 8, at 647; Gen. Laws (1862) c. 215, § 8, at 903.

²⁴ Ariz. Rev. Stat. (1887), § 3242 to 3244.

Accordingly, it can not be accurately asserted that the statutes in any of these ten states "are fairly representative of those found in other states" as is done in REPPY AND TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS (1928), 56.

The Delaware distinction is expressed in the phrase "person having at the time (of making the will) no lawful issue." Rev. Code (1915) § 3251.

²⁵ Ariz. Rev. Stat. (1919) § 1216.

²⁶ Miss. Code (Hemingway, 1927) § 3567.

²⁷ Tex. Rev. Civ. Stat. (1925) art. 8293.

²⁸ Ky. Stat. (Carroll, 1922) § 4847.

²⁹ W. Va. Code Ann. (Barnes, 1923) c. 77, § 16, at 1047.

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after state cautiously continuing, "capable of inheritance" while West Virginia omits the matter of age and adds simply "issue." This state of affairs, an executory limitation on the inheritance of the will and a special limitation on the inheritance of the after-born child, are present in certain other conditions are present in all five states these are the same, provision for or membership in the child he (the testator) might have.

Three of the remaining five states regard the birth of the child as a revocation of the entire will. Ohio³¹ and Kansas³² refer to this as a presumption rebuttable only by specified evidence. Delaware³³ expresses it as a revocation operating as a statutory law but as a presumption. The other two states, New Jersey³⁴ and New York³⁵, are partial to the extent of the after-born child's inheritance but on the limitation that in case of death of the child the descendant, under twenty-one, unmarried and without issue, shall take the portion as remains unexpended for his support and education as to the beneficiaries under the will.

It will be noted that all ten states, Virginia excepted since 1924, exhibit a tendency to avoid in some manner the operation of the entire will. In five the birth avoids it for such child's life and in the normal course of events, permanently. In three the will is "revoked" and in one it is declared "void." The tenth state, Virginia, before 1924, belonged to the first group, but since then has stood alone for partial intestacy. Actually, however, the practical effect of the 1924 act in that state is to invalidate all the will except for the proportion represented by the widow's inheritance.³⁶

As to methods of avoiding these operative provisions, all ten states permit actual provision in the will to accomplish this. All but Delaware give effect to the intent to disinherit as inferred from a mention of the child, while Kansas and Ohio make particular reference to an outside settlement as well.³⁷

³¹ OHIO GEN. CODE (1910) § 10,561.

³² KAN. REV. STAT. (1923) c. 22, § 240. The Kansas provisions are verbatim like the Ohio.

³³ DEL. REV. CODE (1915) § 3251.

³⁴ N. J. COMP. STAT. (1910) 5865, "Wills," § 20.

³⁵ VA. CODE ANN. (1924) § 5242.

³⁶ *Supra* note 35. This is because the after-born child will, of necessity, be the only heir except for his mother.

³⁷ All ten states have separate statutes relative to advancements. In Delaware (Rev. Code [1915] c. 95, § 19) and New Jersey (Rev. 1877, "Descent," p. 297) they are limited to real estate. Havens v. Thompson, 23 N. J. Eq. 321 (1873); Marshall v. Rensch, 3 Del. Ch. 239, 253 (1868). In the remaining states they include personality. Generally these statutes are regarded as applicable only in cases of total intestacy. Marshall v. Rensch, *supra*; In re Robey [1908] 1 Ch. 71.

The second, and alternative, factual situation is where the testator did have a child living at the time of making his will. Call this case 2. In all ten states the birth of a child after the will and under these circumstances operates to revoke the will to the extent of such child's intestate share. The prior will merely fails to that extent to operate in seven states and the child takes his share in fee by inheritance.³⁹ In the remaining three states, this share is subjected to the limitations which have already appeared in another connection, namely, that if the child dies under twenty-one, unmarried and without issue, so much of his portion as remains unexpended for support and education reverts to the person to whom it was given by the will.⁴⁰

In all ten states there are regulatory provisions governing the manner of making up this share. In five all the beneficiaries "contribute proportionately out of the parts devised and bequeathed to them."⁴¹ In three they "contribute ratably, either in kind or in money, as a court of equity in the particular case may deem proper,"⁴² while in two the beneficiaries contribute proportionately "unless . . . a different apportionment be found necessary in order to give effect to the intention of the testator as to that part of the estate which passes by the will."⁴³

The devices for avoiding the operative provisions include in all states provision for the after-born child in the will, and in eight, provision outside, in the form of a "settlement."⁴⁴ An intent to disinherit expressly evidenced in the will is a recognized device in five states.⁴⁵

4 B. R. C. 256 and note at 268; WOERNER, AMERICAN LAW OF ADMINISTRATION, (3d ed. 1923) § 553. In a few jurisdictions it is otherwise: *Payne v. Payne*, 128 Va. 33, 39, 104 S. E. 712 (1920); VA. CODE ANN. (1924) § 5278; *Walters v. Neafus*, 136 Ky. 756, 764, 125 S. W. 167, (1910); KY. STAT. (Carroll 1922) §§ 1407, 4840; *Dittos's Adm'r. v. Cluney's Exrs.*, 22 Ohio St. 436, 441 (1872).

In either event these statutes do not operate on the will, but only on the estate not passing by will. Whereas, therefore, under the pretermitted heirs statutes the existence of a settlement may determine testacy or intestacy, the advancement statutes presuppose intestacy and merely determine the amount of a given share. These latter statutes are therefore not directly concerned here. As a matter of information, it should be added that practically every American jurisdiction has an enactment relative to advancements. As to what are advancements see three annotations in (1923) 26 A. L. R. at 1089, 1106 and 1178.

³⁹ Arizona, Delaware, Kansas, Mississippi, New Jersey, Ohio and Texas. See citations, *supra* note 12.

⁴⁰ Kentucky, Virginia and West Virginia. See citations, *supra* note 12.

⁴¹ ARIZ. REV. STAT. (1919) § 1214; MISS. CODE (Hemingway, 1927) § 3567; N. J. COMP. STAT. (1910) 5865, "Wills," § 21; TEX. REV. CIV. STAT. (1925) art. 8292. In Delaware there is a further provision that "any intestate estate . . . shall be first applied," REV. CODE (1915) § 3253.

⁴² KY. STAT. (Carroll, 1922) § 4848; VA. CODE ANN. (1924) §§ 5242, 5243; W. VA. CODE ANN. (Barnes, 1923) 1647, c. 77, § 17.

⁴³ KAN. REV. STAT. (1923) c. 22, § 243; OHIO GEN. CODE (1910) § 10,564.

⁴⁴ The Delaware statute reads "provision by will or otherwise." Of the ten, only Ohio and Kansas deny effect to a "settlement." Curiously enough these are the only two states that give it effect in case 1. See *supra* notes 12, 31, 32. As to advancement statutes, see *supra* note 37.

⁴⁵ The words "expressly excluded" occur in Kentucky, Virginia and West Virginia, and "disinherited" in Mississippi and New Jersey. See citations *supra* note 12.

Comparing, then, the two situations, it is possible to generalize broadly to this extent: that in case 1, that is, where the testator had no child living at the execution of his will, the birth of a subsequent child operates to affect the entire instrument either by annulling it or revoking it, whereas in case 2, where he had a child living at the time the subsequent birth operates upon a fraction only of the will, namely, to the extent of such after-born child's intestate share. Further, the sweeping effect in the first situation can in general be avoided in two ways: by provision or intent not to provide (from the intention expressed in the will); while the narrower effect in the second can in general be avoided either by provision in the will or by an intent inferred from the will, with one-half the states adding as a third method the expression in the will of an intent to disinherit or exclude.

This is what the statutes say. Practically speaking, what also what they do? To what extent are these differences in wording real? If they are real, and not apparent merely, what policy motivates their existence?

So far as the after-born child, *B*, is concerned there are no differences. If there was no child, *A*, living at the execution of the will, the will is ineffective and *B* gets the whole estate, perhaps shared with his surviving parent. That is, he gets his intestate share. This is exactly what he gets if there was a child, *A*, but of course this share is now smaller. The protection given *B* is constant; he never loses his inheritance, whether it be case 1 or case 2. As to *A*, there is an obvious factual difference, of course. There is no such person to consider in case 1, while in the other there is. In this latter event *A*, as well as *B*, may conceivably get his intestate share; where for instance *A* was the sole beneficiary of the will and there is no surviving spouse who inherits, or if there is one, where the proportions given each under the will are the same as by the local law of descent, an unlikely case. On any other hypothesis the shares of both *A* and the surviving spouse are affected by *B*'s birth. This is particularly so where the will gives part of the estate to strangers. *B*'s constant fraction must now be made up from the shares of all the beneficiaries, and the larger the portion given to strangers the greater the discrepancy between *A*'s testate and intestate share.

Turning from the position of *A* and *B*, to the share of the surviving spouse, how is this affected in the two cases? Where the spouse does not inherit as an heir, his position is, of course, like that of any stranger. But where he is an heir, the birth of *B* in case 1 revokes the will and enables him to inherit. Naturally this may be an estate different from that given him by the will. In case 2 he is not enabled